

1 "Here's why you should carry us." And this  
2 was their pitch, a woman carrying a handbag  
3 and a shopping bag as their core audience.

4 And, Your Honor, nobody on their  
5 side is ever going to stand up in this  
6 courtroom and tell you that that core audience  
7 that they've got there is the core audience  
8 for Versus' bull riding, cage fighting and  
9 hockey. No way.

10 I'm not here to argue which is  
11 better. Please understand that. But I'm  
12 saying they're very different. And  
13 discrimination is about differences.

14 The next to last I guess we have a  
15 chart.

16 JUDGE: Is it H?

17 MR. CARROLL: H. These names are  
18 highly confidential. So I'm not going to  
19 mention any of the names on here. This is a -  
20 - We used to call them Venn diagrams when I  
21 was in school.

22 JUDGE: What did they call them?

1                   MR. CARROLL: Venn diagrams. You  
2                   take -- Did you ever hear the term "Venn  
3                   diagram"?

4                   JUDGE: No.

5                   MR. CARROLL: In math, it was  
6                   those graphs you would do and you would graph  
7                   all the people in one thing and all the people  
8                   in the other and you would see if there is an  
9                   overlap between the two to see how similar or  
10                  different the two groups were.

11                  JUDGE: Okay.

12                  MR. CARROLL: This is a Venn  
13                  diagram that someone on the team cleverly used  
14                  a tennis ball and a golf ball as the images.  
15                  But what it's capturing is the names of the  
16                  top 50 sponsors, advertisers, on Tennis  
17                  Channel and the top 50 on Golf and it's  
18                  saying, "Hey, let's look and see how many of  
19                  them are the same." Only three. Out of a  
20                  list of 50 on one side and 50 on the other  
21                  there's only three.

22                  JUDGE: Oh, I see. The three that

1 are listed in the middle. That's the overlap.

2 MR. CARROLL: Yes. Don't read  
3 those names though.

4 JUDGE: I'm not going. I'm saying  
5 the overlap.

6 MR. CARROLL: Those are the only  
7 three that the two channels have in common.  
8 All of the rest are unique to each of them and  
9 they are not the same on either channel. Very  
10 powerful evidence and very simple evidence of  
11 the fact that they are different and the  
12 advertisers are targeting those differences  
13 with their products.

14 JUDGE: Do you have a similar one  
15 for Versus?

16 MR. CARROLL: We actually do and I  
17 can give you that. I'll tell you right now  
18 the overlap is five. Instead of three you'll  
19 see five.

20 JUDGE: All right. That's good  
21 enough.

22 MR. CARROLL: I just didn't want

1 to --

2 JUDGE: No. That's good enough  
3 for now.

4 MR. CARROLL: And then the last  
5 thing -- and then again I thank you for your  
6 patience, Your Honor -- one of the issues that  
7 Mr. Phillips mentioned that we were going to  
8 point to that he didn't think was relevant was  
9 how much money was spent on programming,  
10 programming costs.

11 Now here's what that is.  
12 Programming cost captures the idea of when you  
13 own a channel you have to buy the rights to  
14 lots of the programming that you air. So if  
15 you own the Golf Channel, Your Honor, and you  
16 want to show the Masters Tournament, you're  
17 going to have to go spend money to buy the  
18 rights from the Masters to air that  
19 programming. And that's probably one of the  
20 most expensive pieces of programming in the  
21 nation, that program, the Masters Golf  
22 Tournament.

1                   And one of the things you can do  
2           is when you want to compare channels and see  
3           if they're different or similar is say to  
4           yourself, "Well, how much is that programming  
5           worth? How much have they spent on  
6           programming, those channels? Is one channel  
7           kinda getting cheap programming? Is another  
8           channel spending a whole lot of money to  
9           acquire premium programming?" And that would  
10          tell you something about whether they're  
11          similar or different in terms of the market  
12          appeal of the programming.

13                   This is Tennis Channel's own  
14          document. The experts are going to fight  
15          about this. You're going to hear about this.  
16          But Mr. Phillips' point in his opening was  
17          that this is a point that we've made up after  
18          the fact and it really shouldn't be  
19          considered. This is Tennis Channel's own  
20          document.

21                   And if you look to the last page  
22          behind the tab -- this is from their 2005

1       strategic plan -- I won't give the numbers.  
2       But you're going to see a huge difference in  
3       programming expense.

4               I've highlighted Golf Channel,  
5       Outdoor Life Network. Remember Outdoor Life  
6       Network is the same as Versus. They just  
7       changed the name. But that's Versus, Golf  
8       Channel. And there's Tennis Channel. And  
9       you'll see that Tennis Channel's actual  
10      programming expense is much, much less than  
11      Versus and Golf Channel.

12             Now there's a reason for that.  
13      And this gets to the final point you were  
14      asking Mr. Phillips about during his session.  
15      And Mr. Phillips was saying there are all  
16      these tennis tournaments worldwide and we can  
17      show them throughout the year. And there's  
18      actually a lot of tournaments that I think  
19      when Mr. Solomon is here as the first witness,  
20      Mr. Phillips presents, he's going to show  
21      proudly, Your Honor, that they have all these  
22      probably hundreds of tennis tournaments.

1           The simple fact is they get most  
2           of them for free. They don't have to pay  
3           anything for it. In fact, that's their  
4           business model. Their business model was  
5           "Hey, we can actually get the tennis  
6           tournaments for free." Why can they get them  
7           for free? Because nobody wants them. It's  
8           that simple.

9           The reason is -- and I want to  
10          pick a place that won't be disrespected by my  
11          comment -- if there's a tennis match in -- I  
12          don't know -- Germany, Hungary that's some  
13          kind of Pro-Am tournament that's not as famous  
14          as the U.S. Open or Wimbledon and it's a  
15          tournament that nobody follows really, Tennis  
16          Channel goes to them and says, "Hey, put it on  
17          TV."

18                 And they go, "Great. It's yours."

19                 JUDGE: It's a PR thing I guess.

20                 MR. CARROLL: It's programming.

21                 They need programming. It fills time on their  
22                 channel.

1 JUDGE: No, I mean from the tennis  
2 --

3 MR. CARROLL: Oh, I'm sorry. From  
4 Germany or Hungary, I didn't mean to limit to  
5 those.

6 JUDGE: Yes.

7 MR. CARROLL: It's great because  
8 they say, "Now we're on TV." But they didn't  
9 have to pay for it.

10 Sometimes things are worth what  
11 you have to pay for them. That's saying you  
12 get what you pay for. There's a reason that  
13 a lot of their programming is free. There's  
14 a reason the Masters is worth a fortune. That  
15 reason is a reason well known to the press.  
16 And our friend at the end will know this and  
17 people in this industry. Certain things are  
18 very popular and people will pay a lot of  
19 money to have them. And a lot of what goes on  
20 out there is not very popular and you can get  
21 it for free.

22 Now to be sure Tennis Channel is



1 proud of the fact that in recent years they  
2 have been able to finally get some of the  
3 programming rights for the Grand Slams,  
4 Wimbledon, U.S. Open. But what you're going  
5 to hear is for the most part they don't have  
6 the weekend matches that everybody wants to  
7 see.

8 I think the U.S. Open is a  
9 tournament that takes three weeks to play.  
10 The early rounds when it's like 120  
11 competitors or 64, real tennis enthusiasts go.  
12 People who really live for tennis will go and  
13 see those. But the rest of us are waiting for  
14 Federer to play Nadal in the final.

15 The Federer and Nadal in the final  
16 is on broadcast TV most times, Your Honor, as  
17 Your Honor noted, because that costs a lot of  
18 money. Everybody wants to see that match.  
19 The early round match between Will Phillips  
20 and Mark Carroll on Court 27 in Grand  
21 Flushing, New York, people are really much  
22 less interested in it.

1           Tennis Channel has been able to  
2       get some of those rights. It's a great thing  
3       that they have. But it doesn't make them  
4       worth more than we've analyzed them to be  
5       worth when we did the cost benefit analysis.

6           Your Honor, those are the comments  
7       I wanted to open with. I thank you for your  
8       patience. We look forward to presenting the  
9       evidence. For the reasons I outlined I think  
10      that it's the opposite in this case. Not only  
11      has my client not discriminated against Tennis  
12      Channel. My client was one of the first  
13      people to help Tennis Channel launch and the  
14      thanks they get for it now is they're being  
15      accused of discrimination only because Tennis  
16      Channel has changed its business model over  
17      the years in a dramatic way, wants us to  
18      forfeit rights that we have and is trying to  
19      make a pitch to us, a sales pitch, that each  
20      time we analyze it just doesn't desire any  
21      different treatment that we've given it.

22           Thank you very much.

1 JUDGE: Well, thank you, Mr.  
2 Carroll. That's a very clear presentation and  
3 just as clear as Mr. Phillips.

4 But I want to ask -- this is the  
5 one I wanted to ask. Mr. Phillips quoted that  
6 segment from the report on the merger, on the  
7 NBC-Comcast merger. And you heard the  
8 language, too.

9 MR. CARROLL: Yes, the FCC.

10 JUDGE: Now that was in what's  
11 called the Technical section.

12 MR. CARROLL: Correct.

13 JUDGE: Why would that be -- Why  
14 was the Commission interested in writing that  
15 language? Are they alerting somebody to  
16 something? That's what I'm trying to get at.

17 MR. CARROLL: What they were  
18 doing, as my understanding of what they were  
19 doing because I would never presume to speak  
20 on behalf of the Commission is there were  
21 conditions that were imposed for the merger.

22 JUDGE: Yes, but that's not

1 unusual. I'm not going to say --

2 MR. CARROLL: Not at all.

3 JUDGE: The conditions as a  
4 general rubric is very common place.

5 MR. CARROLL: Exactly. And  
6 they're explaining why they have imposed  
7 various conditions and the types of evidence  
8 they've looked at for caring about, for  
9 example, possible discrimination going forward  
10 and for putting certain controls in to make  
11 sure that the business is run in a  
12 nondiscriminatory way with respect to  
13 discrimination. And there are restrictions  
14 and limits on. And they speak for themselves  
15 and they're in the order.

16 My understanding is that there  
17 were some submissions made by various groups.  
18 By the way, Tennis Channel lobbied against the  
19 NBC merger. They tried to use it as leverage  
20 against our client and to force our client to  
21 carry. And we didn't change our business  
22 analysis.

1 JUDGE: Well, if they hadn't done  
2 that then maybe they would have been where  
3 they want to be today.

4 (Laughter.)

5 MR. CARROLL: No, they would be  
6 right where they should be. But the technical  
7 group did some analysis. They did some  
8 regression analysis in the technical appendix.  
9 And actually I find the language -- It goes  
10 from saying at one point it shows  
11 discrimination and at another point says it  
12 would support the conclusion and suggests that  
13 there's discrimination.

14 The actual order itself, not the  
15 technical appendix, doesn't use that language  
16 at all. The actual order that the  
17 Commissioners penned in paragraph 117 says  
18 they may have in the past discriminated and  
19 then they drop a footnote that says we don't  
20 reach any conclusions as to whether Comcast  
21 has discriminated against any particular  
22 unaffiliated network in the past. That's the

1 language Your Honor noted as well.

2 So I think the Commission has been  
3 careful to say we are not making any findings  
4 that would control or govern in any particular  
5 case. Indeed there's no right to cross  
6 examination in these proceedings, at least,  
7 not in a proceeding like this one where I get  
8 to cross examine their expert, Mr. Singer, as  
9 I will in this case.

10 JUDGE: So they're not as much  
11 fun.

12 MR. CARROLL: Not nearly as much  
13 fun. No.

14 JUDGE: Well, let me ask you this.  
15 Why would -- I mean obviously you don't  
16 control what the Commission does on that. But  
17 it seems that a company would not like to see  
18 that in a document. I mean from the way that  
19 it's framed it's not supported by anything.  
20 It's offered as a I'm not sure what.

21 But I'm asking from the  
22 Commission's standpoint but from Company's

1       standpoint. Why would a company put up with  
2       that? You're saying, "When did you start  
3       beating your wife almost?"

4               MR. CARROLL: Because, Your Honor,  
5       we've been waiting to move forward with that  
6       deal for quite a while, the NBC deal. And we  
7       just figured we'd fight these fights as we  
8       need to at a later date and we'll live with  
9       it.

10              And Comcast is a big company and  
11       they live with a lot of these things. And at  
12       the end of the day they decided "Fine. We can  
13       live with it. It's not a binding finding  
14       anywhere. We'll deal with it one by one as we  
15       are in this proceeding."

16              JUDGE: Do you have any comment?

17              MR. PHILLIPS: If I might have a  
18       couple minutes, Your Honor.

19              JUDGE: Yes, sir. Very good.

20              MR. PHILLIPS: Mr. Carroll doesn't  
21       mention the fact that in 2009 and 2010 the  
22       Versus and Golf contracts came up for renewal.

1 And none of these tests that they applied to  
2 Tennis Channel were up. In fact, they assumed  
3 distribution levels. They didn't even discuss  
4 them for Golf and Versus in 2009 and 2010 when  
5 those contracts came up. That's not 1995,  
6 Your Honor. That's in the last couple of  
7 years.

8 As far as the competition points,  
9 Your Honor, Mr. Carroll reads some documents  
10 that were drafted by my client in 2004 which  
11 Mr. Solomon and everybody is going to  
12 acknowledge that Tennis Channel in 2004 was a  
13 brand new channel and certainly not where it  
14 is today after it's invested tens of millions  
15 of dollars in rights in tournaments.

16 And, sure, in 2004 they had high  
17 aspirations. They wanted to be more like the  
18 Golf Channel and Versus. But that's not true  
19 anymore and that's not what this case is  
20 about. These 2004 documents, Your Honor, I  
21 don't think really are quite fair to use to  
22 make that comparison.



1 I will also say one other thing,  
2 Your Honor, and if I may read from --

3 JUDGE: Are you saying that the  
4 information is stale or something? Is there  
5 something --

6 MR. PHILLIPS: Sure. When you  
7 read things like -- I'm sorry. When you read  
8 things about we want to be like the Golf  
9 Channel and we're not like the Golf Channel.  
10 And they have more enthusiastic followings,  
11 consider the fact that that's in 2004. It's  
12 a year after launch. It's not today. And I  
13 don't think Mr. Carroll would contend that  
14 were the same today.

15 JUDGE: No. The numbers speak for  
16 themselves.

17 MR. PHILLIPS: Yes.

18 JUDGE: The dates speak for  
19 themselves.

20 MR. PHILLIPS: Yes, Your Honor.  
21 And if I may one of the things that I would  
22 like to mention here, if I could just read a

1 document. Now this is a public document.

2 This is actually from Comcast's own webpage.

3 JUDGE: Their own what?

4 MR. PHILLIPS: From its webpage.

5 JUDGE: Webpage?

6 MR. PHILLIPS: Yes. From its  
7 public webpage, the Comcast Spotlight, and  
8 comcastspotlight.com. And this is what it  
9 says about pro tennis. It says, "Professional  
10 tennis is similar to Professional Golf  
11 Association in its appeal lending itself not  
12 to large audiences but rather to dedicated  
13 viewers with higher financial means, education  
14 and sophisticated lifestyle." This is their  
15 public words. Tennis, Golf.

16 Mr. Carroll says that they're  
17 vastly different. They're not. They're not  
18 materially different for this test, Your  
19 Honor, the point of discrimination. The only  
20 thing that makes a difference here and what I  
21 suggest to Your Honor is affiliation. That's  
22 the reason they're treating the male candidate

1 better here is because of affiliation. That's  
2 what's prescribed.

3 Your Honor, one other thing.  
4 There are some documents out there and you'll  
5 see them in which Tennis Channel for the  
6 purpose of going to advertisers and others  
7 distinguishes itself and says, "We're not the  
8 Golf Channel." And you know every time I  
9 watch an ad by Pepsi it says, "We're not Coca-  
10 Cola."

11 I don't think that the fact that  
12 the Tennis Channel may say to its advertisers  
13 and its audience that we're not the Golf  
14 Channel from time to time is really a  
15 distinction that says that they're not  
16 similarly situated since the closest Toyota  
17 will say it's not Nissan and Ford will say  
18 it's not Chevy. Competitors similarly  
19 situated always try to distinguish themselves  
20 for these purposes.

21 If you look at the advertising  
22 charts that Mr. Carroll just showed you in

1 fact which if you look at it the other way  
2 which -- break it down the other way you see  
3 that the top Tennis advertisers -- and you'll  
4 hear experts talk about this -- it's a much  
5 more of an overlap particularly with the  
6 perspective advertisers.

7 But just look at the ones that are  
8 there. They may have Credit Suisse and we  
9 have ABN Amro. The types of clients we're  
10 looking at for advertising it's the same.

11 Common sense tells you, Your  
12 Honor, that, sure, tennis is different from  
13 golf. But what are they competing for? Your  
14 cable sports networks. They're looking for  
15 the same things. And the reason they're  
16 getting different treatment here is not  
17 because of 1995. It's not because of cost  
18 benefit. That wasn't done. Tennis is  
19 demonstrably and remarkably less expensive  
20 than Golf. The reason is because Comcast owns  
21 Golf and Comcast owns Versus and Comcast  
22 doesn't own Tennis.

1                   Even with Mr. Carroll's chart  
2           about who owns Tennis, it's true that Dish and  
3           DirecTV have minority positions in it. But  
4           there are other MVPDs that don't have any  
5           position and they carry us much more broadly  
6           than Comcast does.

7                   That's all I'd say. If we could  
8           have a short break, Your Honor, I'll go get  
9           Mr. Solomon and we can start.

10                   JUDGE: Yes. That's very good. I  
11           feel a lot more comfortable going into the  
12           evidentiary phase.

13                   I'm going to say one thing about  
14           what you just said though. My association  
15           with a country club was over a period of  
16           years, but it was as a caddy. So there's a  
17           lot of this stuff that I didn't get to see, of  
18           course.

19                   But I do remember this. I  
20           remember that the golf courses were on one  
21           side and the tennis courts were on the other  
22           side. I mean it was altogether like big --

1 You know, it was part of the family setup. I  
2 don't know what that means, but I just find  
3 that interesting.

4 The other thing is I always  
5 wondered why -- I've only got three daughters.  
6 And the youngest one, I mean they're all very  
7 affirmatively -- Their mind set is basically  
8 affirmatively in the direction of equality for  
9 women in employment and whatnot. But the  
10 youngest one is a little bit more intense.  
11 And she will have nothing to do with the  
12 Masters because the Masters doesn't let women  
13 on its course.

14 MR. CARROLL: That's true.

15 JUDGE: Now is that a business --  
16 Well, I'm just saying -- Let me just put these  
17 out there. It doesn't make a heck of a lot of  
18 sense to me because I imagine there are  
19 probably a good number of women like my  
20 daughter and she is meeting all these  
21 characteristics of the age and the income and  
22 the background and all that kind of business.

1                   Number two, she will not -- They  
2                   live locally in D.C. She will not let  
3                   anything come into the house that has anything  
4                   to do with the Washington football club  
5                   because it has a name that has been identified  
6                   as being inherently not only discriminatory  
7                   but actually in a form of being outrageous.

8                   Yet there's a -- And the other  
9                   factor is which is equally important is she  
10                  doesn't like to see scantily clad girls  
11                  running around a football field with -- What  
12                  do they call them? The cheerleaders.

13                 MR. CARROLL: Yes.

14                 JUDGE: So it's a very complicated  
15                 world out there in terms of where you draw  
16                 these lines.

17                 MR. CARROLL: Your Honor, I will  
18                 make one observation based on that. It seems  
19                 and I'm sure Mr. Phillips will agree with me  
20                 you've done a fine job raising your daughter.

21                 JUDGE: I am what I am because of  
22                 my daughters. And what you see is what you

1       get. But I appreciate it. That does not -- I  
2       mean I don't agree with her on everything and  
3       the intensity of all these things or even some  
4       of the things.

5               But as you said you come from a  
6       whole different time set. When I went to  
7       college, the college that I graduated from is  
8       now a far better college. I'm the same way as  
9       you. I would never get in today. And it is  
10      now equally divided, probably even more of a  
11      majority, of women than men in it.

12             But I went there, there were no  
13      women at all. And, boy, if you want to mess up  
14      a guy, a young man growing up, that's the way  
15      to do it.

16                     (Laughter.)

17                     It's a big challenge.

18                     We will be in recess. What time is  
19      it back there? It's over here. I've got it  
20      11:55 a.m. Why don't we break for lunch? A  
21      good time?

22                     MR. CARROLL: Sure, Your Honor.



1 JUDGE: And we'll come back at --  
2 What did I say? We're going to get an hour  
3 and a half. So it's about 1:25 p.m. be  
4 alright. Thank you very much.

5 (Chorus of thank yous.)

6 JUDGE: We're in recess until 1:25  
7 p.m. Off the record.

8 (Whereupon, at 11:50 a.m., the  
9 above-entitled matter recessed to reconvene at  
10 1:25 p.m. the same day.)  
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22 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:30 p.m.)

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JUDGE SIPPEL: Good afternoon.

Please be seated.

I understand that there was a question raised about the doors, about being secured, when we all left for lunch. I decline to -- I haven't thought about that, actually, but I -- the doors certainly should be shut, and my thinking is that there might be somebody that wants to get access to it earlier. So I don't intend to lock it, but I think everything should be pretty secure in here.

MR. CARROLL: That's fine with us, Your Honor.

JUDGE SIPPEL: Okay. Does anybody -- good, no problems with that.

Mr. Solomon?

MR. PHILLIPS: No, I haven't called him yet, Your Honor. I wanted to make sure that we are all ready.

JUDGE SIPPEL: We are ready. Do